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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 10-945, Florence v. The Board
5 of Chosen Freeholders of the County of Burlington.

6 Mr. Goldstein.

7 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

8 ON BEHALF OF THE PETITIONER

9 MR. GOLDSTEIN: Mr. Chief Justice, may it
10 please the Court:

11 We ask this Court to hold that a jail may
12 strip search an arrestee in cases of reasonable
13 suspicion. That is the rule that was applied throughout
14 almost the entire country in the 3 decades after
15 Bell v. Wolfish, without either administrative
16 difficulty or any apparent increase in smuggling. We
17 are here today, of course, because both the Burlington
18 Jail and the Essex County Jail require every arrestee to
19 stand 2 feet in front of a correctional officer and
20 strip naked.

21 JUSTICE GINSBURG: Do you apply the
22 reasonable suspicion rule to all arrestees? I thought
23 you were making a distinction between felons and less
24 serious offenders.

25 MR. GOLDSTEIN: We do apply it to all

1 arrestees. The Respondents in the U.S. Bureau of
2 Prisons do draw a line at major versus minor offenders.
3 I think they do that because they think that people who
4 commit more serious crimes might be inclined to greater
5 criminality. But our rule is one of reasonable
6 suspicion. Our question presented draws the line at
7 minor offenders because this class definition is only
8 people who were arrested for minor offenses.

9 JUSTICE KENNEDY: Is the reasonable
10 suspicion test more easily met if it's a felon detained
11 for a serious felony?

12 MR. GOLDSTEIN: It is in the view of the
13 courts that have considered this question, absolutely.
14 In our view --

15 JUSTICE KENNEDY: In your, in your view?

16 MR. GOLDSTEIN: Yes. And, in fact --

17 JUSTICE KENNEDY: Well, then you are going
18 on a case by case basis based on the offense.

19 MR. GOLDSTEIN: The category -- There is a
20 categorical rule, and that is -- that was adopted by
21 these Respondents, by the Bureau of Prisons and four
22 court of appeals, that says: If you are arrested for a
23 more serious offense, categorically there exists
24 reasonable suspicion. Our case by case rule, it's true,
25 applies with respect to minor offenders. And again,

1 that was the class that was defined here.

2 JUSTICE ALITO: Well, how would this work
3 with respect to individuals who have been arrested for
4 serious offenses? Let's say someone has been arrested
5 for -- for assault. Say it's a case of domestic
6 violence, assault. Would that be enough to justify a
7 search?

8 MR. GOLDSTEIN: I think you will have to
9 ask -- I know you want me to answer the question. Let
10 me just be very clear. This is their rule. The
11 Respondents draw the major -minor offense line. The
12 Respondents apply a reasonable suspicion standard. Now,
13 in my view --

14 JUSTICE ALITO: I understand. You say that
15 you don't want to draw that line; you want to apply it
16 to everybody.

17 MR. GOLDSTEIN: Yes.

18 JUSTICE ALITO: And I'm asking you whether
19 the mere fact that someone has been arrested for a
20 violent offense would in your judgment be sufficient to
21 provide reasonable suspicion.

22 MR. GOLDSTEIN: If the jail made that
23 judgment, we would think that a court would not overturn
24 that judgment. We think that illustrates that, by
25 contrast to when someone is arrested for not paying a

1 fine, that there is no justification whatsoever, because
2 the logic of their own policy is that this is a person
3 who's inclined to violence.

4 JUSTICE KENNEDY: But I take it -- I take it
5 what we're trying to do is to protect the individual
6 dignity of the detainee. But it seems to me that you
7 risk compromising that individual dignity if you say we
8 have reasonable suspicion as to you, but not as to you.
9 You are just setting us up. And you are setting the
10 detainee up for a classification that may be questioned
11 at the time, and will be seen as an affront based on the
12 person's race, based on what he said or she said to the
13 officers coming in.

14 MR. GOLDSTEIN: Right.

15 JUSTICE KENNEDY: So it seems to me that
16 your rule imperils individual dignity in a way that the
17 blanket rule does not.

18 MR. GOLDSTEIN: Well, a couple of points,
19 Justice Kennedy. I think it's an incredibly important
20 issue. They don't have a blanket rule. Remember, the
21 Respondents apply a reasonable suspicion standard. They
22 do strip everyone naked, but if they are going to look
23 for contraband, that is look at the person's mouth, look
24 at their anus, they apply a reasonable suspicion
25 standard.

1 Now, to your various concern that maybe we
2 are inviting discrimination or at least an appearance of
3 discrimination, remember that their rule is going to
4 produce more of that problem than ours, because their
5 rule is not that they have to stitch strip -- they have
6 to strip search everyone for contraband, but their rule
7 is they can, they can make a choice.

8 This Court in the Fourth -- they say we --

9 JUSTICE KENNEDY: Well, I'm not sure if it's
10 their rule or our rule. Ultimately it's going to be our
11 rule.

12 MR. GOLDSTEIN: Yes, okay. Well then, first
13 let me say I hope not. I hope that your rule is that
14 there has to be a reasonable suspicion standard, which
15 is the rule that was applied almost everywhere in the
16 wake of Bell v. Wolfish, without --

17 JUSTICE GINSBURG: To do -- to do what?

18 MR. GOLDSTEIN: Yes.

19 JUSTICE GINSBURG: You just said stripped
20 naked is different from a different strip search.

21 MR. GOLDSTEIN: Yes, exactly.

22 JUSTICE GINSBURG: So what is permitted?
23 There are various things. What, is showering in the
24 presence of officers?

25 MR. GOLDSTEIN: Showering in the presence of

1 officers is not something that requires reasonable
2 suspicion. The courts have uniformly concluded that if
3 you are just generally in an area in which you are being
4 monitored by the officers, that's not a Fourth Amendment
5 search that violates a reasonable expectation of
6 privacy. This is different.

7 JUSTICE GINSBURG: They -- they can be
8 inspected without their clothes? Just it's more than
9 that?

10 MR. GOLDSTEIN: There are two different
11 scenarios. One is a common room where everyone is
12 standing around and for jail security purposes --

13 JUSTICE KENNEDY: A common?

14 MR. GOLDSTEIN: A common room, a common
15 shower area, and of course for security purposes.

16 This is different, Justice Ginsburg. You
17 asked what is prohibited in the absence of reasonable
18 suspicion. What is prohibited is standing 2 feet away
19 from the person --

20 JUSTICE GINSBURG: No, I want to know what
21 is permitted.

22 MR. GOLDSTEIN: Yes, what is permitted is
23 anything --what is not subject to a reasonable suspicion
24 standard is anything other than looking at a close
25 inspection of the person at arm's length. What the

1 courts of appeals have uniformly recognized and the
2 lower courts and what the literature recognizes and
3 really what I think concerned this Court in the Safford
4 case is that when you are standing so close to the
5 person inspecting their genitals, looking directly at
6 their most private parts of their bodies, that is a
7 direct intrusion on their individual privacy --

8 JUSTICE SOTOMAYOR: Sorry. Are you
9 suggesting -- three different levels. Stripping naked:
10 It's okay to stand 5 feet away, but not 2?

11 MR. GOLDSTEIN: I don't think that the
12 courts have had to confront 5 feet versus 2 feet. What
13 they have confronted is, they acknowledge that jails are
14 places that require security and so if you are just
15 observing a shower room that does not implicate a
16 reasonable expectation of privacy.

17 JUSTICE SOTOMAYOR: All right. So are you
18 -- are you taking the position that it's the purpose of
19 the search --

20 MR. GOLDSTEIN: No, I'm --

21 JUSTICE SOTOMAYOR: -- that -- that's at
22 issue?

23 MR. GOLDSTEIN: No, it's the closeness of
24 it. There is not a problem, I think, with the question
25 of 2, 3, 4, or 5 feet. These searches all occur in the

1 same way, and that is the officer stands directly in
2 front of you. The testimony here is 2 feet away. That
3 seems to be the common --

4 JUSTICE SOTOMAYOR: I'm still unsure.

5 MR. GOLDSTEIN: Yes.

6 JUSTICE SOTOMAYOR: If it's okay to
7 shower --

8 MR. GOLDSTEIN: Yes.

9 JUSTICE SOTOMAYOR: -- and have an officer
10 watch you shower naked --

11 MR. GOLDSTEIN: Yes.

12 JUSTICE SOTOMAYOR: -- what is the greater
13 intrusion is that you are standing 2 as opposed to 5
14 feet away?

15 MR. GOLDSTEIN: 2 versus 10 feet away or
16 just generally observing the room. This is exactly --

17 JUSTICE SOTOMAYOR: That is a line that
18 doesn't make much sense to me.

19 MR. GOLDSTEIN: Okay.

20 JUSTICE SOTOMAYOR: Then let's go to the
21 next line, which is -- that's one kind of search.

22 MR. GOLDSTEIN: Yeah.

23 JUSTICE SOTOMAYOR: The second is I think
24 what some have called a visual cavity search.

25 MR. GOLDSTEIN: Yes.

1 JUSTICE SOTOMAYOR: Whether you are going to
2 have the individual open or expose private parts.

3 MR. GOLDSTEIN: Yes.

4 JUSTICE SOTOMAYOR: Can you make an argument
5 that that is different than just a visual search?

6 MR. GOLDSTEIN: You can. So let me just
7 say, let me try and close up my answer to the question
8 of the 5 versus 10 feet and then turn immediately to
9 this visual body cavity search.

10 Remember, this is -- the Court will recall
11 that this is a reprise of the argument in the Safford
12 case, where the schools there argued that, well, there
13 is an observation of these students in gym class, they
14 shower together naked, they undress naked. And the
15 Court said it's quite different when you're standing
16 right there looking over the student. And so that's
17 what implicates a Fourth Amendment right of privacy, and
18 the distinction did make sense.

19 As to your question, yes, there is a
20 material difference, we think, although we think both
21 should be covered by our rule. But a visual body cavity
22 inspection as occurred in the Essex facility here, where
23 you require someone to bend over and cough, which is
24 what the testimony is in this case --

25 JUSTICE GINSBURG: One, not the other?

1 MR. GOLDSTEIN: That's correct.

2 -- that after the second jail had a slightly
3 different search protocol, in which the testimony is
4 that he was required to bend over and cough and expose
5 his anus for inspection, and the Respondents themselves
6 regard that as a more significant intrusion and they
7 apply a reasonable suspicion standard themselves to that
8 --

9 JUSTICE SCALIA: Mr. Goldstein, what -- what
10 you propose is reasonable enough, I suppose, and some
11 States could adopt that kind of a protocol instead of
12 what they have. But what you are asserting is that the
13 Fourth Amendment prohibits them from adopting it, and
14 the obstacle I see is that at the time the Fourth
15 Amendment was adopted, this -- this was standard
16 practice, to strip search people who were admitted to
17 prisons. So how could it be deemed an unreasonable
18 invasion of privacy when it -- when it was done all the
19 time and nobody thought it was unconstitutional?

20 MR. GOLDSTEIN: We don't believe that the
21 premise is correct. If you read history differently
22 than me, I'm not going to be able to persuade you. But
23 our understanding of the history is that the closest
24 they can come to is two things: First, that people were
25 strip searched upon arrest, and that certainly is not

1 the rule under the Fourth Amendment; and that in certain
2 jails at the time of the founding other inmates in a
3 process of ablution which, as almost kind of a ritual
4 cleansing, would strip search new inmates. It had
5 nothing to do with the jail officials themselves or
6 trying to intercept contraband.

7 JUSTICE SCALIA: That is somehow less of an
8 intrusion on your privacy, to be naked in front of a
9 whole bunch of inmates, rather than one jail official
10 inspecting?

11 MR. GOLDSTEIN: Well, first, it wasn't a
12 nearly -- the nearly uniform practice that I think your
13 question assumes. And it's just a different kettle of
14 fish entirely, that -- we don't believe, obviously, that
15 that historical lesson obtains today that the prisoners
16 can strip search new inmates, new arrestees as they come
17 in.

18 I do agree with the basic premise of your
19 question that it's -- our position can't just be that,
20 hey, I've got a reasonable rule. I do have to in,
21 either under the terms of *Bell v. Wolfish* or
22 *Turner v. Safley*, establish that this is an exaggerated
23 response, that this is much more, materially more than
24 is necessary to accomplish their goals.

25 JUSTICE GINSBURG: But less intrusive than

1 the one, than the search in Bell v. Wolfish, which
2 involved pretrial detainees?

3 MR. GOLDSTEIN: No, Justice Ginsburg, we
4 disagree with that. At least as to the second search,
5 we think that there is no difference between the degree
6 of intrusion here and in Bell. But there is another
7 significant reason not just in the nature of the search,
8 but a big difference between this case and Bell is that
9 the inmates in that case made a voluntary choice. They
10 decided to have the contact visit that was --

11 JUSTICE GINSBURG: Do we know if the
12 pretrial detainees in Bell were also inspected on entry
13 into the facility?

14 MR. GOLDSTEIN: We do not. I tried
15 everything I could to check the record of that case and
16 there was no record of an admission strip search at the
17 MCC at the time.

18 CHIEF JUSTICE ROBERTS: Counsel, is there --
19 there's a distinction between the simple strip search
20 and the visual body cavity search. You say that they
21 apply reasonable suspicion standard to the visual body
22 cavity search.

23 MR. GOLDSTEIN: Yes.

24 CHIEF JUSTICE ROBERTS: So is the visual
25 cavity search therefore off the table?

1 MR. GOLDSTEIN: No, it is not. We contend
2 that the Fourth Amendment prohibited the visual body
3 cavity search at the Essex facility. So --

4 CHIEF JUSTICE ROBERTS: Right, right. But
5 you would say that they had to have a reasonable
6 articulable suspicion before they could do that?

7 MR. GOLDSTEIN: We say that under their
8 written policy they should have, but they didn't. The
9 Burlington County -- the only evidence about a
10 conclusion of the jail about reasonable suspicion is
11 that the Burlington county intake officer filled out a
12 form saying there is no reasonable suspicion here. And
13 Essex I don't believe contends that there was reasonable
14 suspicion to engage in a visual body cavity search.
15 They deny, as a matter of fact, that it happened.

16 CHIEF JUSTICE ROBERTS: So -- so you see a
17 distinction between what they actually do and the
18 written policy.

19 MR. GOLDSTEIN: I -- I do with respect to
20 the Essex -- I apologize -- no. What happened here is
21 that Essex after this search occurred, and this is
22 described in the Essex brief in opposition, in case you
23 want to look at it later, at 3 in note 1 -- Essex after
24 the search in this case changed its policy. We were
25 denied an injunction going forward under L.A. v. Lyons,

1 so we -- it's just a question of damages for the search
2 that occurred at the time under their old policy.

3 JUSTICE ALITO: I'm confused about your --

4 JUSTICE KAGAN: Could I --

5 JUSTICE ALITO: -- your position. Suppose a
6 jurisdiction has the policy of requiring every inmate
7 who is arrested and is going to be held in custody to
8 disrobe and take a shower and apply medication for the
9 prevention of the spread of lice and is observed while
10 this is taking place from some distance by a corrections
11 officer, let's say 10 feet away. Is that -- does that
12 require a reasonable suspicion?

13 MR. GOLDSTEIN: It does not. The -- and --
14 and --

15 JUSTICE ALITO: So your -- your only concern
16 is searches that go further than that.

17 MR. GOLDSTEIN: That's exactly right. The
18 very close inspection of the individual's genitals,
19 which can occur absolutely so long as there is some
20 minimal level of suspicion that's created.

21 I do want to return to Justice Kennedy's
22 concern about dignitary interests here and whether
23 drawing any sort --

24 JUSTICE ALITO: Could I just follow up on
25 that? Is there a dispute of fact as to whether anything

1 beyond that occurred in Burlington County?

2 MR. GOLDSTEIN: In Burlington County, there
3 is a dispute about the so-called genital lift, whether
4 Mr. Florence was required to lift his genitals or not.
5 There is no dispute that he was required directly in
6 front of an officer to strip naked, despite the officer
7 having made a finding, which is on page 390 of the joint
8 appendix, that there was no reasonable suspicion to
9 conduct a strip search. That is the only factual
10 dispute --

11 JUSTICE SOTOMAYOR: Counsel --

12 MR. GOLDSTEIN: -- in the entire case.

13 JUSTICE SOTOMAYOR: Could you clarify two
14 points for me? The first is, was he admitted into the
15 general population at Burlington?

16 MR. GOLDSTEIN: The record is not entirely
17 clear. What the record says is that for the first few
18 days of his stay -- remember, he inexplicably was kept
19 for 6 days. For the first several days, he was kept in
20 a cell with only one other inmate, or possibly two, and
21 one time he had lunch with other people. In Essex, he
22 was admitted to the general population.

23 JUSTICE SOTOMAYOR: The prior charge against
24 your client was the use -- involved the use of a deadly
25 weapon. Assuming the prison knew this, wouldn't that

1 provide the reasonable suspicion that you argue was
2 missing?

3 MR. GOLDSTEIN: No, because it
4 depends because of the breadth of the phrase "possession
5 of a deadly weapon," as this case illustrates. The
6 record shows that the possession of the deadly weapon --
7 and that's why this charge was not pursued by the
8 State -- is -- was that he was pulled over at a traffic
9 stop and he drove away. The deadly weapon is the car --

10 JUSTICE SOTOMAYOR: So now you are -- you
11 are feeding into your adversary's argument that what you
12 are asking the police to do on intake, or the
13 corrections facility on intake, is to investigate in
14 that fine detail? They can't even look at the rap sheet
15 --

16 MR. GOLDSTEIN: No --

17 JUSTICE SOTOMAYOR: -- and see use of a
18 deadly weapon and say, ah, this guy could be dangerous?

19 MR. GOLDSTEIN: No, Justice Sotomayor. The
20 rap sheet does not contain that charge. What the rap
21 sheet does show, and we are perfectly fine with them
22 looking at the rap sheet -- the rap sheet, and it's in
23 the joint appendix -- the rap sheet says that he had a
24 single charge, he pleaded guilty, he got a term of
25 probation. There is nothing about that the jail would

1 have had any information suggesting that he had some
2 charge involving a deadly weapon. And that's why they
3 themselves certified that there was no reasonable
4 suspicion --

5 JUSTICE KENNEDY: Well, is the rap sheet
6 always available immediately? I thought it was rather
7 common -- correct me if I'm wrong; it's based on
8 practice some years ago -- that it -- it would take
9 maybe 24 hours, 48 hours for the wiretap -- for the wire
10 services and the Internet to -- to report that he's
11 wanted for questioning for some very, very serious crime
12 in some other State?

13 I think -- in my practice at least -- county
14 jails were much more dangerous than penitentiaries,
15 because you don't know who these people are. You arrest
16 them for traffic and they may be some serial killer.
17 You do not know.

18 MR. GOLDSTEIN: Sure. First, that is not
19 the view of the jails in this case. Remember, they
20 apply a reasonable suspicion standard. They did not
21 find any concern in their own policies -- neither does
22 the Marshals Service, ICE, with this prospect of some
23 prior offense.

24 As to what the rule is, and how common it is
25 and whether this works in practice, the jails here did

1 look him up in the New Jersey Criminal Justice
2 Information System. That's in the record. They are
3 required by New Jersey law to do that. It's a -- every
4 single one of these jails has computer access to the
5 NJCJIS, and also to the NCIC; they just type in his
6 identifying information.

7 They were able to pull him up without any
8 difficulty, and they have not complained that they
9 didn't have enough information about him. They filled
10 out a form saying there is no reasonable suspicion here.
11 And remember, our rule only operates in a system,
12 Justice Kennedy, in which the jail does have enough
13 information. When -- our point is this: If the jail
14 has the facts, as it did here, to affirmatively
15 determine that there is no reasonable suspicion, which
16 is what they decided about Mr. Florence, then it is an
17 extraordinary intrusion on dignity and autonomy to strip
18 him naked when they have no reason to do so.

19 CHIEF JUSTICE ROBERTS: Counsel -- -
20 counsel, my understanding of the statistics -- and
21 correct me if I'm wrong -- is that they get about 70 new
22 people going through this process a day. Is there
23 anything in the record about how much additional time it
24 would require to look at each one, to look at their
25 record, to determine which category they should fall

1 into, to strip search or not, as opposed to having a
2 blanket rule?

3 MR. GOLDSTEIN: Sure. There is because they
4 do this already. They -- it is not an administrative
5 problem. They apply our rule today. Remember,
6 Mr. Chief Justice, when he arrived at the Burlington
7 County Jail, they did an assessment of him and
8 determined that there was no reasonable suspicion. The
9 jails in this case did pull up his prior criminal
10 history, and they have no problem doing that. They
11 apply our standard today. It is not a difficult one.

12 But --

13 JUSTICE SCALIA: Mr. Goldstein, you have
14 acknowledged that we -- we have held that when you have
15 visitors, you may be stripped -- strip searched after
16 the visit, and the same kind of close examination that
17 you object to here. Now, your explanation why that is
18 okay is that that is voluntary --

19 MR. GOLDSTEIN: I have two explanations --

20 JUSTICE SCALIA: That you don't have to have
21 visitors. Can you really condition your -- your -- your
22 having visitors on your waiver of your Fourth Amendment
23 rights?

24 MR. GOLDSTEIN: Yes. Block establishes that
25 you have no right whatsoever to have contact visits, so

1 under Schneckloth v. Bustamonte, of course, you can say
2 I voluntarily relinquish my Fourth Amendment right in
3 exchange for this privilege. But I have a second --

4 JUSTICE SCALIA: Are -- are you sure about
5 that?

6 MR. GOLDSTEIN: I --

7 JUSTICE SCALIA: You can -- you can
8 condition certain -- certain privileges upon a waiver
9 of -- of constitutional privileges?

10 MR. GOLDSTEIN: Yes, I believe that
11 that's -- I think that's a fair statement of the law.

12 I do have a second point, though. And that
13 is that the principal reason underlying
14 Bell v. Wolfish's holding that those searches were
15 reasonable is that it was essential to deter smuggling,
16 and that deterrence rationale has much more of an
17 attenuated relationship to this case.

18 Remember that the inmate in that case was
19 having a planned meeting with someone, and the
20 representation of the government is that our problem is
21 if you plan to have somebody come visit you and you are
22 going to have a contact visit, you can plan for them to
23 try and sneak something to you. This Court has set --

24 JUSTICE KAGAN: Mr. Goldstein, there of
25 course were guards there who were watching the visits.

1 And as I understand that case, there was really no
2 empirical evidence that smuggling came about as a result
3 of these visits.

4 MR. GOLDSTEIN: Well, can I just read to you
5 what the Court said about that, just so -- the Court did
6 have a slightly different take, I think. And this is
7 from page 559 of -- of the Court's opinion: "That there
8 has been only one instance where an MCC inmate was
9 discovered attempting to smuggle contraband into the
10 institution on this person may be more a testament to
11 the effectiveness of the search technique as a deterrent
12 than to any lack of interest on the part of the inmates
13 to secrete and import such items when the opportunity
14 arises."

15 And our point is that that -- when you have
16 an unexpected arrest here -- remember, Mr. Florence
17 showed the paperwork that he was not wanted for arrest.
18 And that's going to be generally true in all kinds of
19 traffic stops and the like --

20 JUSTICE BREYER: Well, which is it you're
21 doing? I mean, I imagine -- I thought you were saying
22 you always need a reasonable suspicion, so I imagine a
23 case where the person is going to be arrested, put into
24 the general prison population, there is a warrant out
25 against him for second-degree murder, and the policeman

1 stopping him for a traffic offense arrests him because
2 he knows he is wanted on a warrant in another place, and
3 the jail has a policy that says when you're -- come in
4 here because of second-degree murder, we strip search.
5 Okay? Can they do that under your rule or not?

6 MR. GOLDSTEIN: Yes.

7 JUSTICE BREYER: That's all they know.

8 MR. GOLDSTEIN: Yes. That's reasonable
9 suspicion.

10 JUSTICE BREYER: Then you do not want to --
11 then you are not saying it always has to be reasonable
12 suspicion.

13 MR. GOLDSTEIN: It's just a debate about
14 words. We think that is reasonable suspicion.

15 JUSTICE BREYER: Oh, all right. That isn't
16 helping me.

17 MR. GOLDSTEIN: I'm sorry.

18 JUSTICE BREYER: What helps me is to know
19 what the category of things is that the jail in your
20 opinion is going to have to look into the
21 characteristics of this individual person, and when I
22 look at the ABA, they talked about minor arrests.

23 MR. GOLDSTEIN: Yes.

24 JUSTICE BREYER: And when I look at some of
25 the cases, there is a long list, like violence, drugs,

1 and so forth, where you don't have to, where you can
2 just use the general fact that he was arrested --

3 MR. GOLDSTEIN: Right.

4 JUSTICE BREYER: -- for the thing. But there
5 are other ones, minor ones, where you do. So what is
6 your rule on that?

7 MR. GOLDSTEIN: Our rule that we would
8 expect is that, with respect to minor offenders, that's
9 when you assess --

10 JUSTICE BREYER: Okay. Then the next
11 question which we'll get --

12 MR. GOLDSTEIN: Yes.

13 JUSTICE BREYER: -- who is a minor offender
14 and how do you administer that rule?

15 MR. GOLDSTEIN: Okay. I think that is a
16 great question for them, because that's their rule.
17 They have a rule that says for minor offender that you
18 have to have reasonable suspicion to search for
19 contraband.

20 JUSTICE GINSBURG: But you are trying to
21 state the constitutional rule, and you keep talking
22 about what is their rule, and we are trying to find out
23 what are the limits --

24 MR. GOLDSTEIN: Yes.

25 JUSTICE GINSBURG: -- of the rule, and I

1 think you've already qualified what you said opening.
2 Opening, you said reasonable suspicion is the rule for
3 everyone, the felon as well as the minor offenders. Now
4 you seem to be saying, well, this case involves only
5 minor offenders, so let's limit it to that. That's what
6 I thought you were saying now.

7 MR. GOLDSTEIN: Yes, that's right. Because
8 this case only involves minor offenders, we have
9 articulated a rule with respect to minor offenders.

10 JUSTICE BREYER: I mean, that of course --

11 MR. GOLDSTEIN: Okay.

12 JUSTICE BREYER: -- unfortunately, I'm
13 asking you and not them, and -- and it's the same
14 question.

15 MR. GOLDSTEIN: Okay. Sure.

16 JUSTICE BREYER: How do you want us to write
17 this so that jail personnel all over the country --

18 MR. GOLDSTEIN: Yes.

19 JUSTICE BREYER: -- have to be able to
20 follow it and know exactly what they are supposed to do.

21 MR. GOLDSTEIN: For 3 decades the rule that
22 was articulated by the Federal courts and applied
23 without difficulty is one that says for minor offenses.
24 When that was applied in practice it was basically done
25 at a felony versus misdemeanor line. The court accepted

1 that if you are -- the courts accepted that if you are
2 suspected of a more serious offense, then for
3 administrative reasons and because we just think you
4 might be engaged in more criminality, then you don't
5 have to have any individualized inquiry whatsoever.

6 JUSTICE SCALIA: I can understand that -- I
7 can understand that for cavity searches, but -- but why
8 for the search to see if -- if the person has any fleas
9 or cooties or, you know, any -- any other communicable
10 disease before he is put into the general population?
11 Are -- are felons more likely to have those than
12 non-felons?

13 MR. GOLDSTEIN: No, they are not.

14 JUSTICE SCALIA: So that line makes no sense
15 for -- for that aspect of the search which is -- is just
16 we want to make sure that we have a clean prison.

17 MR. GOLDSTEIN: That is not correct. That
18 aspect -- what the testimony in this case establishes is
19 that the jail guards allow any sort of medical rationale
20 for the search to be conducted by medical personnel, not
21 by the guards themselves. All these inmates are
22 examined by a medical person, a nurse or the like, and
23 they are responsible for -- for --

24 JUSTICE SCALIA: And that -- that's where
25 the Fourth Amendment invasion of privacy line is to be

1 drawn? If you're examined close up by someone who has a
2 medical degree, it's okay? And on the other hand, if
3 it's someone who does not have a medical degree, it's
4 not okay?

5 MR. GOLDSTEIN: That is correct.

6 JUSTICE SCALIA: That can't be the line as
7 to whether your privacy is being invaded.

8 MR. GOLDSTEIN: It -- it can be the line and
9 it is the line that has been accepted for decades.

10 JUSTICE KENNEDY: But -- but you -- you
11 would have to --

12 JUSTICE GINSBURG: -- dividing line?

13 JUSTICE KENNEDY: -- keep the person in
14 custody, say, for 24, 48 hours until the medical
15 personnel could come. Do you have 24-hour medical
16 personnel for intakes that are 2 in the morning?

17 MR. GOLDSTEIN: Yes. The intake process,
18 the testimony is that --

19 JUSTICE GINSBURG: But they are --

20 JUSTICE KENNEDY: You are -- you are telling
21 us that every county jail in -- in the United States has
22 medical personnel on duty 24 hours a day ready to do a
23 -- a search?

24 MR. GOLDSTEIN: No, I apologize,
25 Justice Kennedy. I'm telling you what is in the record

1 in this case. And that is --

2 JUSTICE BREYER: What you said before was 2
3 feet is too close, but 5 feet is okay. Are you sticking
4 with that?

5 MR. GOLDSTEIN: Justice Breyer, I'm saying
6 that a close inspection which is intended to examine the
7 person's individual --

8 JUSTICE BREYER: Yes.

9 MR. GOLDSTEIN: -- genitals, and whether
10 it's at 2 feet or 4 feet I don't think is the relevant
11 line.

12 If I could make one point, and then reserve
13 the remainder of my time, would that --

14 JUSTICE GINSBURG: Made I just ask, on your
15 medical personnel, children in school get inspected for
16 -- for head lice, prisoners for body lice. You don't
17 need a doctor to do that?

18 MR. GOLDSTEIN: No, that's right, but if
19 that is right, what happens is that medical
20 professionals are the people who are assigned that
21 responsibility. That's the testimony in this case. The
22 only last point that I wanted to make is --

23 JUSTICE GINSBURG: But that's not
24 constitutionally required.

25 MR. GOLDSTEIN: I -- I agree. That --

1 JUSTICE GINSBURG: So that's another thing
2 that -- that you don't need to -- to -- they can inspect
3 for body lice, and that's - that's okay?

4 MR. GOLDSTEIN: If that's what they're
5 doing, I think that that is okay. The courts have said
6 that that is not itself a -- because of the prospect of
7 handling that problem with shampoo, which is what these
8 jails do, that that's not a sufficient -- a sufficient
9 justification to require the person to strip naked.

10 The only other point that I did want to make
11 is that this is the rule, not just at Burlington and
12 Essex, but also of the U.S. Marshal Service, which has
13 the intake of 220,000 inmates every year, and also of
14 the Bureau of Immigration Customs Enforcement, which
15 intakes 384,000 a year.

16 JUSTICE GINSBURG: But the government tells
17 us that that's true only if they don't put the arrestee
18 in the general population.

19 MR. GOLDSTEIN: That's not correct. That is
20 only the policy of the U.S. Bureau of Prisons, which has
21 an intake of minor offenders of only a few thousand
22 people a year. For the Marshals Service and for ICE,
23 which have a combined 600,000 people every year, they do
24 not have that separate housing rule.

25 If I could reserve the remainder of my time.

1 CHIEF JUSTICE ROBERTS: We will give you
2 rebuttal time, but maybe just to be clear --

3 MR. GOLDSTEIN: Yes.

4 CHIEF JUSTICE ROBERTS: -- You don't -- do
5 you or do you not have an objection to the superseding
6 ECCF policy?

7 MR. GOLDSTEIN: We -- if the -- we do,
8 because they still have to stand naked directly in front
9 of the correctional officer under the superseding
10 policy. What the superseding policy is, which is
11 Burlington's policy throughout this, is that they will
12 not search the person for contraband, which is their
13 supposed interest here, for contraband, in the absence
14 of reasonable suspicion.

15 Both jails at the time of this search and
16 also now will still require the person to strip naked,
17 supposedly for contraband, even though their own policy
18 says we won't search for -- we won't engage in the depth
19 of search that is required, we won't look at the anus,
20 we won't look in the person's mouth, in the absence of
21 reasonable suspicion.

22 CHIEF JUSTICE ROBERTS: That is the current
23 policy?

24 MR. GOLDSTEIN: That is the current policy.

25 CHIEF JUSTICE ROBERTS: And you have no

1 problem with that.

2 MR. GOLDSTEIN: We do have --

3 CHIEF JUSTICE ROBERTS: I mean, you have no
4 problem with the reasonable, articulable suspicion
5 aspect of the body cavity search.

6 MR. GOLDSTEIN: That's correct.

7 CHIEF JUSTICE ROBERTS: Okay. And with
8 respect to the simple strip search --

9 MR. GOLDSTEIN: Yes.

10 CHIEF JUSTICE ROBERTS: -- your only
11 objection is that the guard is too close to the inmate?

12 MR. GOLDSTEIN: That's right.

13 CHIEF JUSTICE ROBERTS: Okay. Thank you.
14 Mr. Phillips.

15 ORAL ARGUMENT OF CARTER G. PHILLIPS

16 ON BEHALF OF THE RESPONDENTS

17 MR. PHILLIPS: Thank you, Mr. Chief Justice,
18 and may it please the Court:

19 I -- I actually appreciate the clarification
20 that your questions brought to this case, because I
21 think there is a bit of confusion that I would like to
22 try to clear up, although my -- my colleague's movement
23 in terms of answering some of the questions left me a
24 little bit perplexed as to exactly what the nature of
25 their claims are.

1 The -- the first question that it seems to
2 me the Court should focus on is what policy is at issue
3 here. And obviously, since the class certification
4 deals with one set of issues and the plaintiff's claims
5 deem with another set of issues, I think you have to be
6 careful.

7 I think you have to focus on the policies
8 that existed in 2005. That was the basis on which he
9 was in fact searched under these circumstances. And the
10 policy in Burlington was that -- was primarily aimed,
11 frankly, at health and tattoos, and the policy at Essex
12 was aimed primarily at contraband and then secondarily
13 at tattoos and health.

14 And the policy at Burlington was largely
15 a -- you come into prison, you give up your clothes,
16 they look through your clothes, you take a shower, they
17 examine you fairly cursorily, but look at you, and then
18 give you prison garb and move along your way.

19 CHIEF JUSTICE ROBERTS: I'm sorry. Is the
20 shower and look at you cursorily, are those separate
21 things? Or is it during the shower?

22 MR. PHILLIPS: It -- it's before or during.

23 CHIEF JUSTICE ROBERTS: Because your friend
24 places a lot of significance on how close the
25 examination is.

1 MR. PHILLIPS: Right.

2 CHIEF JUSTICE ROBERTS: So under that policy
3 how close was the examination?

4 MR. PHILLIPS: Yes. It almost certainly
5 would have been about an arm's length, because at that
6 -- I mean, the problem is if you are exchanging clothes
7 with somebody, you are handing them clothes to change
8 into, it is sort of hard to be longer than arm's length
9 and actually get the clothes into his hand. So that --

10 JUSTICE SCALIA: Two arms' lengths. I mean,
11 he could reach out, right?

12 MR. PHILLIPS: Okay. Two arms' lengths.

13 (Laughter.)

14 CHIEF JUSTICE ROBERTS: Well, that's not
15 right. They could take --

16 MR. PHILLIPS: But I'm not --

17 CHIEF JUSTICE ROBERTS: That's not right.

18 You could take the clothes off, put them in a bin --

19 MR. PHILLIPS: Right.

20 CHIEF JUSTICE ROBERTS: The person examines
21 the bin.

22 MR. PHILLIPS: Right. And that's actually
23 what they do in Essex. In Essex, they do it that way.
24 The difference between Essex is that Essex in fact does
25 have -- part of the problem is terminological, all

1 right. You know, Burlington is basically a body visual
2 observation, and the district court said that's
3 unconstitutional, that just observing at all is
4 unconstitutional.

5 To some extent it seems to me my -- my
6 friend here has given up that part of the district
7 court's decision, which clearly the court of appeals to
8 the extent it reversed that part ought to be affirmed on
9 that ground alone.

10 JUSTICE BREYER: Visual observation for more
11 than 2 feet, or less than 2 feet?

12 MR. PHILLIPS: Right, although that -- that
13 was not the district court's theory. The district court
14 didn't say 2 to 3 feet.

15 JUSTICE BREYER: What happened? Do we know?
16 Was it within 2 feet or not within 2 feet?

17 MR. PHILLIPS: Well, it depends on whose
18 version of it.

19 JUSTICE BREYER: Do you know?

20 MR. PHILLIPS: You have to remember, the
21 district court granted summary judgment to the plaintiff
22 in this case, so you would have to -- you would have to
23 interpret -- you would have to give us the benefit of
24 the interpretation, which was that it was more than 2
25 feet.

1 But the court of appeals reversed, of
2 course, without regard to that, because the court of
3 appeals said, look, if you -- if you apply this Court's
4 decision in *Bell v. Wolfish*, it doesn't matter, because
5 you can engage in a much more intrusive true body cavity
6 search, which frankly is more intrusive than even what
7 Essex County does in this case, because he wasn't asked
8 to bend over and to -- and to have a body cavity anal
9 search. What he was asked to do was to squat and cough,
10 in the event that -- because ordinarily that will cause
11 the contraband then to fall out, and you can -- and you
12 can catch it under those circumstances.

13 So this is -- that's -- that's sort of the
14 context in which this issue comes up.

15 JUSTICE KAGAN: Mr. Phillips, if I could
16 understand your position, you think that there is no
17 reasonable suspicion even for that more intrusive body
18 cavity search, is that right.

19 MR. PHILLIPS: That's correct, That's the
20 rule of law.

21 JUSTICE KAGAN: And does it matter to you
22 whether the person is being introduced into the general
23 prison population, or would you also say that if the
24 person is not being introduced into the general prison
25 population? Do you still think that there is no

1 reasonable suspicion requirement?

2 MR. PHILLIPS: I would say from my
3 perspective, I think even -- even if they weren't going
4 to be admitted into the general prison population,
5 because the risks remain too substantial. But the truth
6 is, I don't have to defend that argument, because both
7 -- both of these jails admit their inmates into the --
8 into the general population 99.9 percent of the time.

9 JUSTICE KAGAN: Would a manual search --

10 MR. PHILLIPS: So that's not a line we draw.

11 JUSTICE ALITO: Would you say that
12 regardless of the offense for which the person is
13 arrested? There have been some stories in the news
14 recently about cities that have taken to arresting
15 people for traffic citations. Suppose someone is just
16 arrested because they have a lot of tickets for being
17 caught on speed cameras, let's say. That person can be
18 subjected to the searches that you are describing?

19 MR. PHILLIPS: Yes, Justice Alito. I think
20 the basic principle we are asking for is that deference
21 to the jails and -- and to the administrators of the
22 jails requires that this Court respect their judgment
23 that you can't make a distinction based on that specific
24 individual; that whether somebody is a minor offender or
25 a major offender, one, is never all that clear in the

1 first place; and two, isn't a basis on which to
2 distinguish the risks that it poses to the --

3 JUSTICE BREYER: Try the ABA. The ABA is
4 minor offenses, not drugs, not violence, and there you
5 have to have reasonable suspicion. Now, I've read
6 through the briefs and I can't find a lot of
7 contrabanders that were caught in that category. In
8 fact, my law clerk thinks it's one out of 64,000 or
9 less. So -- so what is the justification for a rule to
10 avoid reasonable suspicion in that category?

11 MR. PHILLIPS: If -- if you look at the
12 expert testimony that was before the court in the
13 district court in this case, both the expert testimony
14 of the plaintiff and the expert testimony of the
15 defendant -- this is at 348a of the joint appendix, it
16 says "a greater presence of contraband amongst those
17 individuals that have minor offenses." That's his --
18 that's their expert's characterization, that minor
19 offenders bring in more contraband than major offenders.
20 Our experts said misdemeanants can be more dangerous and
21 more likely to bring in contraband.

22 JUSTICE BREYER: It's a conclusion, and we
23 have a lot of practical experience because different
24 States have different rules and San Francisco came in
25 with I think the toughest on your side, for your side.

1 I just say, looking through that, it's very hard to find
2 somebody who really was in this minor offender category,
3 who really was found to have contraband. So what should
4 I look at to show that my initial reaction from the
5 quick reading is wrong?

6 MR. PHILLIPS: Well, I --

7 JUSTICE BREYER: Do I just say --

8 MR. PHILLIPS: -- I think you can go back to
9 Bell v. Wolfish, where this Court said that the fact
10 that there is not a lot of contraband being found may be
11 a testament to the effectiveness of the deterrent.

12 JUSTICE SOTOMAYOR: So why do we change the
13 policy? In Bell we found that the policy was
14 successful. Even though there were searches, contraband
15 still got in. So virtually every circuit in practice in
16 the Federal system have been following this reasonable
17 suspicion for minor crimes and they have been fairly
18 successful. So why do we change the constitutional rule
19 to let them do more?

20 MR. PHILLIPS: Well, I think that --

21 JUSTICE SOTOMAYOR: To invade more.

22 MR. PHILLIPS: Well, I mean, I think first
23 of all anybody who thinks that the problems of
24 contraband are less serious today than they were in 1978
25 is -- is ignoring reality.

1 JUSTICE SOTOMAYOR: I understand contraband
2 is serious. But most of the studies point to it not
3 being on intake, but coming in through guards, coming in
4 through contact visits. The great cause today is that
5 from corrupt correction officials.

6 MR. PHILLIPS: Well, we can debate that.
7 But, Justice Sotomayor, it seems to me that the
8 fundamental principle that ought to undergird the
9 entirety of the Court's analysis here comes out of
10 Turner v. Safley and that line of cases.

11 JUSTICE SOTOMAYOR: Counsel, could I ask you
12 something just in terms of your rule. I think your
13 brief says your rule is you are not entitled
14 constitutionally to any right of privacy in prison.

15 MR. PHILLIPS: No.

16 JUSTICE SOTOMAYOR: If that's the case, are
17 you saying that if the prisons decide on a manual
18 search, every prisoner who comes in, correction officers
19 can manually check their cavities?

20 MR. PHILLIPS: No, Justice Sotomayor. No.

21 JUSTICE SOTOMAYOR: So there is some privacy
22 rule there?

23 MR. PHILLIPS: I can be clear about this.
24 It seems to me that Hudson v. Palmer and the -- and the
25 history of the Fourth Amendment clearly suggest that

1 there is no reasonable expectation of privacy of being
2 viewed naked in a prison. And therefore, the ordinary
3 Burlington approach of having somebody take a shower and
4 looking at him or her naked for tattoos and health and
5 incidental contraband, clearly constitutional, clearly
6 doesn't even raise a Fourth Amendment issue.

7 When you get beyond that point and start to
8 begin the -- what Essex does, which is not a true anal
9 cavity search, but simply an anal focus and genital
10 focus search, I think that is subject to the
11 Turner v. Safley and-or the Bell v. Wolfish standard.

12 JUSTICE SOTOMAYOR: Can we go back to
13 Justice Alito's question? Isn't one of the factors that
14 we look at under the Fourth Amendment reasonableness?
15 And should we be thinking about the fact that many of
16 these people who are now being arrested are being put
17 into general populations or into jails, sometimes not
18 just overnight but for longer periods of time, like this
19 gentleman, for 6 days before he sees a magistrate?
20 Should we be considering a rule that basically says your
21 right to search someone depends on whether that
22 individual has in fact been arrested for a crime that's
23 going to lead to jail time or not, whether that person's
24 been presented to a magistrate to see whether there is
25 in fact probable cause for the arrest and detention of

1 this individual? I mean, there is something unsettling
2 about permitting the police to arrest people for things,
3 like kids who are staying out after curfew with no
4 other, based on probably nothing else.

5 MR. PHILLIPS: Justice Sotomayor, I think
6 what is disturbing about this case is in fact that he
7 was arrested under circumstances in which he candidly
8 shouldn't have been arrested as a matter of State law.
9 I understand that. But I think to change the
10 constitutional rule and to change the Turner v. Safley
11 and Bell v. Wolfish standards and ignore what the
12 underlying inquiry should be here, which is these
13 policies which apply across the board impinge
14 constitutional protections, but nevertheless represent
15 the good faith judgment of our jailers.

16 JUSTICE SOTOMAYOR: But what are we doing
17 with the presumption of innocence? That's also a
18 constitutional right. And so shouldn't the degree to
19 which a search is permitted be conditioned in some way
20 on whether or not this person has been presented to a
21 magistrate?

22 MR. PHILLIPS: If you ask me the way I would
23 analyze it, I would -- if you want to adopt a different
24 set of standards about who ought to be arrested and who
25 ought to be taken to jail, that's fine. I understand

1 that.

2 JUSTICE SOTOMAYOR: Sure.

3 MR. PHILLIPS: But I think once you are
4 talking about actually bringing someone into the jail to
5 be admitted into the general population and what is
6 without question one of the most dangerous, most risky
7 environments, in that context I would hope that this
8 court, rather than asking individual jailers to make
9 decisions on the basis of -- where they clearly will not
10 have the kind of information you are asking them to make
11 and where if they make a judgment wrong in either
12 direction all it means is litigation. Either they --

13 CHIEF JUSTICE ROBERTS: I thought -- I
14 thought your friend said that is exactly what you do
15 with respect to the visual body cavity search,
16 reasonable articulable suspicion, under the new policy.

17 MR. PHILLIPS: That's what we do with a true
18 anal body cavity search. What we -- I mean, we changed
19 the policy to be sure.

20 CHIEF JUSTICE ROBERTS: Right.

21 MR. PHILLIPS: We changed the policy because
22 of litigation concerns.

23 CHIEF JUSTICE ROBERTS: Well now, as I
24 understand it, with respect to --

25 MR. PHILLIPS: Liability concerns.

1 CHIEF JUSTICE ROBERTS: -- with respect to
2 visual body cavity searches, you require a particular
3 individual reason, right?

4 MR. PHILLIPS: Yes.

5 CHIEF JUSTICE ROBERTS: Okay. And you don't
6 require that with respect to simple strip search?

7 MR. PHILLIPS: Right.

8 CHIEF JUSTICE ROBERTS: Okay. So you agree
9 with your friend that the only thing at issue here is
10 how close the guard is going to be to the individual who
11 you have no reasonable suspicion to think is different
12 from anybody else during a simple strip search?

13 MR. PHILLIPS: Well --

14 CHIEF JUSTICE ROBERTS: You want -- he says
15 2 feet is too close, 5 feet or whatever is okay. You
16 want to go to 2 feet. You don't want to have to stand
17 back to 6 feet. That's all the case comes down to?

18 MR. PHILLIPS: I don't -- well, you can
19 characterize it that way. But I think the better way to
20 think about it is that what Essex wants, what Essex
21 policy permitted it to do, was to examine the --

22 CHIEF JUSTICE ROBERTS: I'm not interested
23 in what Essex policy permitted it to do in the past. I
24 -- I'm looking at the new policy, all right? Under the
25 new policy, you have reasonable articulable suspicion --

1 MR. PHILLIPS: Right.

2 CHIEF JUSTICE ROBERTS: -- for everything
3 except simple strip search and observation.

4 MR. PHILLIPS: Well, see, that's the
5 problem, is that the language there is different.
6 Because the -- the truth is that the line that the new
7 policy draws is between a true -- what I -- what I think
8 Bell v. Wolfish was describing, where you ask the inmate
9 to bend over and expose his or her anus for a cavity
10 search. On that score, that's what -- we don't do that.
11 But we do, in fact, ask --

12 JUSTICE SOTOMAYOR: Mr. Phillips --

13 CHIEF JUSTICE ROBERTS: I'm sorry. Could I
14 finish and find out what you do? You said we don't do
15 that. We do what?

16 MR. PHILLIPS: Right. What we do is ask the
17 individual to lift his genitals and to squat and cough.

18 CHIEF JUSTICE ROBERTS: Okay. So you do
19 more than a simple strip search.

20 MR. PHILLIPS: Right, slightly more than a
21 simple --

22 JUSTICE SCALIA: But -- but we've just
23 acknowledged here --

24 MR. PHILLIPS: But I don't think that is the
25 line to draw.

1 JUSTICE SCALIA: But there is still an -- an
2 issue in the case beyond the ordinary visual inspection,
3 and that is this, even though you have changed your
4 policy now --

5 MR. PHILLIPS: Right, we are still liable.

6 JUSTICE SCALIA: The question remains
7 whether that change in policy was constitutionally
8 required, so that when -- when you treated the -- the
9 plaintiff in a different fashion under the old policy,
10 that was a violation of the Constitution.

11 Doesn't -- doesn't that question remain in
12 the case?

13 MR. PHILLIPS: That question clearly remains
14 in the case. I'm not --

15 JUSTICE SCALIA: Okay. So the -- we have to
16 consider both, the pure visual and also the inspection
17 for contraband.

18 MR. PHILLIPS: Right.

19 And all I'm -- all I -- the only point I
20 have been trying to make here is that if you -- if you
21 look at the way the district court analyzed the case,
22 the district court split it up, and it's the basis of
23 the class distinction versus the --

24 JUSTICE KENNEDY: Does the record or common
25 experience justify an argument that if you have the

1 person who's stopped just for a traffic ticket, but that
2 person is going to be in custody for five or six days,
3 that person might well prefer an institution where
4 everyone has been searched before he or she is put into
5 the population with this?

6 MR. PHILLIPS: Justice Kennedy, there
7 actually is testimony in the record from the warden
8 saying that in order to ensure everybody's safety, we
9 are better off with a blanket policy that says we are
10 going to engage in -- in some form of a search -- Essex
11 has a slightly more intrusive one -- but it's all
12 designed to accomplish the same thing. It's not just
13 designed to ensure against contraband and -- and that --
14 it's designed to ensure that there isn't somebody like
15 Mr. Florence who is going to end up being poked or
16 otherwise --

17 JUSTICE BREYER: Is there any evidence -- I
18 count seven or eight States anyway that have some
19 variation of the reasonable suspicion rule like what
20 they want -- roughly. Is there any evidence at all that
21 in those seven or eight States, there is more contraband
22 being smuggled in?

23 MR. PHILLIPS: Well, there is the testimony
24 in the record from their expert, who said that in
25 Kentucky, there is today -- the single biggest problem

1 in Kentucky prisons and the biggest cause of death is
2 drug overdose, which suggests that there is a serious
3 contraband issue in Kentucky. Kentucky is in one of
4 those -- is one of those -- is inside one of the
5 circuits that has had a reasonable suspicion requirement
6 as a constitutional matter forever.

7 So I would say there yes, there is some
8 evidence from which you could infer that it's worse now
9 than it was. But I would also ask the Court to rely on
10 its common sense and its own -- what is essentially
11 took judicial notice of in Bell v. Wolfish and
12 Rutherford v. Black, which is this is a serious problem,
13 and it is no less a serious problem today than it was
14 more than 30 years ago, when this Court --

15 JUSTICE GINSBURG: Are there any -- are
16 there any constitutional limits, in your view? You say
17 you didn't attempt the kind of search that was done in
18 Bell v. Wolfish. Is there any constitutional impediment
19 to your doing so?

20 MR. PHILLIPS: I -- I don't believe that --
21 my position would be no, there isn't a constitutional
22 impediment, but --

23 JUSTICE GINSBURG: So there's no --

24 MR. PHILLIPS: The balance would tip in
25 favor of the -- of the institution under those

1 circumstances. I do think -- obviously, there is a
2 limit between a manual physical body cavity search, and
3 that it seems to me, yes, I think -- that would -- that
4 would be a very different balance of the equation, and
5 I -- I suspect I would be very hard pressed to just --
6 to convince five members of this Court that that's
7 the --

8 JUSTICE SCALIA: You -- you want us to write
9 an opinion that applies only to squatting and coughing.
10 Is that it?

11 MR. PHILLIPS: Well, you may want to write
12 it slightly differently.

13 JUSTICE SCALIA: Yes.

14 (Laughter.)

15 MR. PHILLIPS: No, but what -- but what I
16 would really like is an opinion that recognizes that
17 deference to the prison and to their judgment is what's
18 appropriate under these circumstances, and that extends
19 all the way to the Bell v. Wolfish line. The only
20 difference being that I would like for the Court to
21 analyze it under Turner v. Safley, in which -- in which
22 the analysis is, is there -- you know, is there a
23 logical nexus between the rule that the -- that the
24 prisons have in preventing a problem, and the answer is
25 yes, and are there reasonable alternatives. And there,

1 the answer is no. If the --

2 JUSTICE GINSBURG: You are saying that they
3 can do the full -- as far as the Constitution is
4 concerned, all of these searches are permissible.

5 MR. PHILLIPS: All -- clearly, all of our
6 searches are permissible, and I would go --

7 JUSTICE GINSBURG: In Bell v. Wolfish --

8 MR. PHILLIPS: In Bell v. Wolfish. Yes. I
9 think that's exactly the holding of Bell v. Wolfish.
10 Bell v. Wolfish was not tied in its opinion itself to
11 the fact that they --

12 JUSTICE GINSBURG: But they did -- they
13 didn't stress -- they didn't stress that there was a
14 visitor who could -- who could give the inmate
15 contraband. Bell v. Wolfish doesn't -- and I asked Mr.
16 Goldstein whether we know whether the pretrial detainees
17 in New York were searched that way on entry, and he said
18 there is nothing that shows one way or the other.

19 MR. PHILLIPS: Right. I think that's -- I
20 think that's correct. We don't know. And of course,
21 part of -- part of the empirical problem in -- in that
22 is that that facility had only been opened for four
23 months anyway. So it was really going to be difficult,
24 if you were going to adopt the policy they had adopted
25 in Bell, to insist on some sort of empirical proof --

1 JUSTICE KAGAN: The one significant
2 difference between Bell and this case was that in Bell,
3 there was a real opportunity for people to plan, to
4 conspire together to bring in contraband. Here, you are
5 talking about somebody who is arrested on the spot,
6 there is no opportunity for planning, for conspiracy
7 with respect to contraband, is there?

8 MR. PHILLIPS: No, but the policy itself --
9 may I answer the question?

10 The policy is aimed at all people, not just
11 Mr. Florence, and if you aim it at all people, there are
12 people who self-report who obviously have got an
13 opportunity to bring in contraband, and there are a lot
14 of people who just get arrested and happen to have drugs
15 or something on them, and rather than show those when
16 they are being stopped for a speeding ticket, will
17 likely stick it in their pocket or put it somewhere
18 else.

19 Thank you, Your Honor.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 Ms. Saharsky?

22 ORAL ARGUMENT BY NICOLE A. SAHARSKY

23 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE

24 SUPPORTING THE RESPONDENTS

25 MS. SAHARSKY: Mr. Chief Justice, and may it

1 please the Court:

2 The searches at issue in Bell are very
3 similar to the searches at issue in this case, and they
4 should be upheld. I want to start with Justice Kagan's
5 question. It is true that contact visits with Bell are
6 different from a person coming into the jail for the
7 first time, in that there might be a greater opportunity
8 for planning, but as one of the Justices pointed out,
9 there was less of an opportunity to actually get
10 contraband, the person coming in was going to be
11 searched, the inmate, as Justice Marshall pointed out,
12 was wearing a one-piece zip-up jumper, and he was being
13 watched the entire time.

14 The visit -- the contraband situation in
15 this case at intake, the person does have an
16 opportunity, even if they are not self-reporting,
17 knowing that they are going to be arrested. Protesters,
18 for example, who decide deliberately to get arrested.
19 They might be stopped by the police, they see the squad
20 car behind them. They might have a gun or contraband in
21 their car and think hey, I'm going to put that on my
22 person, I just need to get it somewhere that is not
23 going to be found during a patdown search, and then
24 potentially they have the contraband with them.

25 Also, the process of going from the

1 arrest -- point of arrest to the general jail population
2 is not a quick one. The person typically goes, for
3 example, to a metropolitan police department -- that is
4 what happens here -- and the person would mix
5 potentially there in a holding cell with other
6 offenders.

7 If this Court for example adopted a rule
8 saying that minor offenders would not be searched in a
9 way that other offenders would, I have no doubt that
10 there are some offenders in those circumstances, all on
11 the bus together to go to the general jail population,
12 who would give the stuff to the minor offenders --

13 JUSTICE GINSBURG: Then how do you get --

14 MS. SAHARSKY: To try to get them to bring
15 it in.

16 JUSTICE GINSBURG: That's not the Federal
17 rules, and by the way, the brief was really confusing.
18 When what -- when I read page 1, page 1 tells me that
19 the BOP policy requires all incoming pretrial detainees
20 to be subject to visual body cavity inspections. And
21 then it isn't until page 30 that I learn that there is
22 an exception, for the very category of arrestee that we
23 are talking about here. That they are not subject to
24 body cavity inspections unless there is reasonable
25 suspicion that they are carrying contraband.

1 That the misdemeanor or civil contempt
2 offender is not subject.

3 MS. SAHARSKY: I'm sorry if that was
4 confusing. The Bureau of Prisons policy is that a
5 prisoner will not be put in the general population,
6 being allowed to mix with other offenders, unless he or
7 she has undergone the strip search --

8 JUSTICE GINSBURG: Yes, but I want to know
9 how people in this category are treated in the Federal
10 system. As you -- you --

11 MS. SAHARSKY: The people --

12 JUSTICE GINSBURG: You reversed it. They --
13 those people are not subject to this visual body cavity
14 search.

15 MS. SAHARSKY: Those people when they go
16 into the jail would be asked whether they are willing to
17 consent to this type of search. In most cases, they do
18 consent. If they don't consent and there is not
19 reasonable suspicion, then they are not placed in the
20 general jail population; they are kept separate from the
21 other offenders. So it is the case, the rule that the
22 Third Circuit identified which is: A blanket policy
23 that anyone that's going to go into the general jail
24 population and mix with everyone else has to be strip
25 searched. That is the Federal Bureau of Prisons'

1 policy. I should note that --

2 CHIEF JUSTICE ROBERTS: I'm sorry. I'm sure
3 I missed something. You say when they go in they are
4 asked: Will you consent to a more intrusive body cavity
5 search and be put into the general population; or if you
6 don't, you don't have to be searched and we put you in
7 some place else. Who consents to that?

8 MS. SAHARSKY: Well, the general jail
9 population has certain facilities, you know, computer
10 facilities and others that you don't get when you are in
11 a cell by yourselves. As a practical matter this arises
12 very infrequently in the Federal system. We are talking
13 about fewer than 1 percent of offenders.

14 And the question before the Court at this
15 point really is, you have before you a blanket policy
16 saying we need to strip search everyone and is that
17 something that is unreasonable or irrational in the way
18 that the Court has considered its normal deference to
19 prison officials and I just -- I would like --

20 JUSTICE KENNEDY: I understand most of the
21 general proposition that your side is advancing, but I
22 have to say, I was somewhat surprised at the evidence,
23 the amount of contraband that was discovered and the
24 amount of weapons that was discovered that is in the
25 literature and citations was somewhat skimpy. I thought

1 there would be a stronger showing than I found in the
2 briefs.

3 MS. SAHARSKY: Well, there are not empirical
4 studies of this type of information. Typically it
5 arises when there are incidents at a facility and
6 incident reports are written up. They are not published
7 regularly. There is not some kind of laboratory study
8 that you can do. The facilities have an incident that
9 they try to deal with. Sometimes it makes the news.
10 Those are the things that we reported. I would hate for
11 the Court to think that there is not evidence of people
12 who committed -- minor offenders in the record bringing
13 in very serious things into prisons jails.

14 I point you to footnote 15 in the
15 government's brief which talks about people being
16 arrested for traffic offenses and smuggling pipes in
17 body cavities. I'd point the Court to both experts in
18 this case cited by Mr. Phillips. I'd point the Court to
19 the record in Bull, the San Francisco case.

20 JUSTICE SOTOMAYOR: The issue has to be
21 certainly some misdemeanor. Some people charged with
22 misdemeanor crimes will try to smuggle things in. The
23 issue is how many of them would not have been found on a
24 reasonable suspicion standard. I think Justice Breyer
25 said in the San Francisco study it appears only one.

1 MS. SAHARSKY: I think that that is a very
2 hazardous thing for courts to do with 20/20 hindsight.
3 You know, the Court could look back at individual
4 offenders and might have information --

5 JUSTICE SOTOMAYOR: But we don't have 20/20.
6 We have how many years, 15 years since Bell where
7 prisons have been applying the reasonable suspicion
8 standard. And the most you could muster under that
9 standard is one example of a case where someone has
10 entered? At some point empirical evidence has to mean
11 something in terms of us judging the question of
12 reasonableness.

13 MS. SAHARSKY: I agree with you, but what
14 I'm saying is that the individuals who are doing the
15 searches at issue have very limited information about
16 people. This is when you have people who are coming
17 into the first -- the system for the first time. They
18 have had the most contact with the outside world. You
19 have the least amount of information about them. In the
20 Federal system you don't know --

21 JUSTICE SOTOMAYOR: I don't have a question
22 about that today. I know it's bad to base your
23 judgments on your own personal experiences. When I was
24 a prosecutor, it took sometimes days to get a rap sheet.
25 I understand that that's no longer the case today? That

1 there virtually almost always accessible by computers
2 today?

3 MS. SAHARSKY: That may be true but it's not
4 the information that the people who do intake and are
5 doing the searches have. They do not have that
6 information on their fingertips in the Federal system.
7 They have name, date of birth, and the offense the
8 person was charged with. They don't have anything else.

9 And the question before the Court, if I may,
10 is whether there are reasons for a blanket rule that
11 this Court should defer to, and I would say there are
12 several.

13 First of all you cannot say that there are
14 some minor offenders that don't pose a contraband risk.
15 They are documented in the record. Second you have
16 individuals who are making very quick determination.
17 They have large numbers of people to get through into
18 the general prison population. They have very little
19 time, and if they guess wrong, those mistakes can be
20 deadly. Third the rule needs to be --

21 JUSTICE ALITO: Suppose we accept the
22 Petitioner's concession that it is permissible to
23 require everybody who is arrested to disrobe and shower
24 under the observation of the corrections officer from a
25 certain distance. Now the question would become: How

1 many people who do that will still be able to smuggle in
2 contraband?

3 MS. SAHARSKY: Well there would be
4 contraband found that would be found in body cavities.
5 And we have documented in this record and other records,
6 in our brief that there are folks who do that, and that
7 contraband is not found until they do these --

8 JUSTICE BREYER: That's my -- that is my
9 problem. You -- I overstated the strength of your
10 evidence. I was just trying to throw it out, but I
11 understated it. San Francisco's point is really the 30
12 to 60 percent or some very high percentage of people who
13 come in for minor crimes are high on drugs or have
14 been -- and there is just that footnote really which has
15 a few examples. Definitely they are there in this
16 category. So would it be helpful if you included in the
17 excluded part people who were high on drugs? You see,
18 so we give you the high on drugs people. It's the drug
19 offense, and those who are high on drugs, and those -- I
20 mean is there a way of drawing this rule that we could
21 catch most of the people --

22 MS. SAHARSKY: I think the fundamental
23 question for the Court is who is supposed to be doing
24 this line drawing. And you've said case after case
25 after case after case you are going to defer to the

1 prison officials who have seen this stuff on the ground
2 day to day.

3 JUSTICE BREYER: The simplest thing for any
4 prison official is say do it for everybody.

5 MS. SAHARSKY: That's --

6 JUSTICE BREYER: And so the fact they do it
7 for everybody and don't try to make some exclusion for
8 traffic violators or something might be consistent with
9 little or no evidence; it might be consistent with some.
10 That's why I keep looking for it.

11 MS. SAHARSKY: There are many good reasons
12 to have a policy to do it for everyone. It is easily --
13 easy to administer when you have lots of people. It is
14 done for the protection of the people like Petitioner
15 who don't want to be knifed in the shower --

16 JUSTICE GINSBURG: If there is so much sense
17 to the policy, why isn't the Federal policy? Before you
18 said because there aren't that many offenders. If there
19 were more, then would there be -- would the Federal
20 policy change so that even people who are in on a
21 contempt charge or a minor crime --

22 MS. SAHARSKY: Yes. The Federal government
23 thinks that that blanket policy is a good one. It made
24 one modification to its policy in 2003 when the weight
25 of the circuits was against it. But again this is a

1 policy that is done for everyone's protection. A point
2 that Justice Kennedy made earlier is that there --

3 JUSTICE GINSBURG: I'm sorry, I didn't
4 understand. You think the Feds think it's a good policy
5 to inspect everyone?

6 MS. SAHARSKY: Yes, to inspect everyone who
7 would be put in the general jail population. That the
8 Third Circuit's holding, and that is what we are
9 defending in this case. Because when you have a rule
10 that treats everyone the same, you don't have folks that
11 are singled out. You don't have any security gaps. We
12 urge you to affirm the judgment from the court below.

13 CHIEF JUSTICE ROBERTS: That you, counsel.
14 Mr. Goldstein, take four minutes.

15 REBUTTAL ARGUMENT BY THOMAS C. GOLDSTEIN
16 ON BEHALF OF THE PETITIONER

17 MR. GOLDSTEIN: Thank you, sir.

18 I have three points to make. The first is
19 that my friend from the United States says defer to the
20 experts. But the point that the United States
21 consistently omits is that there are 600,000 offenders
22 that go into the Federal system every year. I don't
23 understand the claim that one -- this only involves 1
24 percent of Federal offenders.

25 The marshal service and ICE admit 600,000

1 offenders every year under our standard. They are not
2 kept in separate housing. These are cited in our brief.
3 600,000 people, is their expert judgment, are subject to
4 a reasonable suspicion standard when they are admitted
5 to jail.

6 The second point about numbers,
7 Justice Breyer, there is a significant empirical study,
8 and that is, the County of Orange case, the district
9 judge there did an unbelievable detailed job going
10 through the record of 26,000 admissions into the system
11 and was able to identify only a single instance where
12 contraband would have gotten in under a reasonable
13 suspicion standard.

14 There is also evidence in this case, and the
15 evidence, to my surprise, that my friends keep pointing
16 to, there is a memorandum from the Essex jail system.
17 It's at page 70A to 71S of the Joint Appendix.

18 And it tells you two really relevant things.
19 It says, every year they admit 25,175 people into this
20 jail, and that they only found 14 instances of
21 contraband. And they don't even make the claim that
22 those 14 instances out of 25,000 would not have been
23 found under a reasonable suspicion standard. So you
24 have evidence in this record about this particular case.

25 Third, a couple of points have been made

1 about whether, Justice Breyer, you asked whether someone
2 who is high on drugs. The uniform rule, and this is not
3 just the ABA but the expert standard of the American
4 Correctional Association, what they say is that
5 essentially -- almost anything will do. What will not
6 amount to reasonable suspicion is when you have a minor
7 offender, and we do have -- There are 700,000 people in
8 jail in the United States every year for misdemeanor
9 offenses.

10 There are a lot of people who are having a
11 very significant intrusion on privacy and the expert
12 standard, the rule that was applied under
13 Bell v. Wolfish is when you have people who come in on a
14 minor offense, they don't have any drug history. They
15 are not high on drugs. There was no opportunity to hide
16 a weapon.

17 I'm not sure where they think the gun is
18 going to be hidden that is not going to show up in the
19 very close manual pat down that they do of every one of
20 these people that isn't going to show up in --

21 JUSTICE ALITO: I don't think you are really
22 arguing for an individualized reasonable suspicion
23 standard. I think you are arguing for a rule that draws
24 distinctions based on categories that correspond only
25 perhaps very roughly to reasonable suspicion.

1 MR. GOLDSTEIN: Well, first, there are real
2 categories that are overinclusive in favor of the jails,
3 like if it's a serious offense or if they have any drug
4 history. And then on top of that, if there is any
5 individualized basis that the jails can articulate, that
6 will do as well.

7 We are not saying that categorically people
8 will be excluded from being searched. We are saying
9 that there are entire categories that is will
10 automatically be searchable. We are just saying don't
11 throw the baby out with the bath water.

12 When somebody is pulled over like Mr.
13 Florence and there's just -- it's laugh out loud funny
14 to think he is smuggling in -- something into this jail;
15 that it's too much of an intrusion to put him under the
16 direct, you know, two feet away, I'm going to look at
17 your genitals, as opposed to the ordinary intrusion of
18 saying we are going to oversee the showers.

19 There is no when it comes to that group of
20 people. And there are a lot of them that they represent
21 anything like a material threat of smuggling. And this
22 is a significant intrusion on individual privacy and
23 individual dignity. Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.
25 The case is submitted.

1 (Whereupon, at 11:05 a.m., the case in the
2 above-entitled matter was submitted.)

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